

IN THE MATTER OF	:	BEFORE THE
DONALDSON FUNERAL HOME	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 10-001C
.....		

DECISION AND ORDER

On April 26, May 24, July 26, October 4, and October 25, 2010, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Donaldson Funeral Home for a Funeral Home and Mortuaries Conditional Use in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, filed pursuant to Section 131.N.22 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to compliance with the notice and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sang Oh, Esquire, represented the Petitioner. The Petitioner called Robert Vogel, John Gary, Jay Donaldson, Mickey Cornelius, and Michael Staiano as witnesses who testified in support of the petition. Mark Gouin testified as a rebuttal witness in support of the petition. William Erskine, Esquire, represented Opponent St. Louis Catholic Congregation ("St. Louis Church"). Miguel Iraola, Al Ruebling, Joan Lancos, F. Patrick Marlatt, Scott Erickson, Michael

Trice, James Caprara, Norman Belden, Edmund S. Coale, III, Anne Schiefer Pierce, Veronika Carella, Catherine Stefano, John Stefano, testified in opposition to the petition.

Preliminary Matters

1. Amended Plan

At the outset of the hearing, the Petitioner introduced into evidence an Amended Conditional Use Plan dated April 26, 2010 (Petitioner's Exhibit 1).¹ The amended plan depicts a 6-foot high privacy fence on the northern portion of the Property and an enhanced landscape buffer in this general area, a new means of ingress/egress showing one lane in and two lanes out and the elimination of the walkway connecting the Property to Christ Evangelical Lutheran Church of Columbia. The Petitioner also introduced into evidence revised elevations and floor plans (Exhibit 2). The revisions eliminate the chapel spire to reduce the height of the structure and reduce the number of chapel seats to 152 fixed seats. Pursuant to Hearing Examiner Rule 9.5, I determined the amendment was not substantive and could be admitted.

2. Opponent's Witnesses and Hearing Examiner Rule 8.2 – Signing Up to Testify

Hearing Examiner Rule 8.2 provides in pertinent part that only individuals who have signed the roster prior to the end of the petitioner's case, or are called by the petitioner in rebuttal, will be permitted to testify. At the May 24, 2010 continuation hearing, and after the close of the petitioner's case in chief, Opponent St. Louis Church called Miguel Iraola and Al Ruebling to testify. On objection from the Petitioner, I permitted these witnesses to testify, ruling that

¹ The Conditional Use Plan submitted with the Petition is dated December 2009.

"individuals" does not include experts called to testify by an opponent party because the rules do not expressly encompass such witnesses.

I subsequently researched the issue and concluded the ruling was inconsistent with the requirements of administrative due process by compromising the due process notice owed to the Petitioner.² At the July 26, 2010 continuation hearing, I informed counsel of this necessary interpretation. To ensure the Petitioner would have equal opportunity to present rebuttal witnesses to address all the issues presented by Messrs. Iraola and Ruebling, I further instructed counsel that the Petitioner would be given the opportunity to continue the hearing in order to call the necessary rebuttal witnesses. Because the hearing was necessarily continued to October 4, 2010, the Petitioner did not make a formal continuance request.

3. Petitioner's Technical (Noise) Report

At the October 4, 2010 continuation hearing, the Petitioner called Michael Staiano as a rebuttal witness and sought to introduce into evidence an engineering noise estimation report prepared by the witness. On objection by Opponent's counsel, I ruled the document is a Technical Report within the meaning of Hearing Examiner rule 7.4, which provides as follows.

Pre-submission of Technical Reports. Any petitioner or proponent wishing to submit a technical report or other similar documentary evidence to the hearing examiner must file a copy of the report with the clerk at least thirty (30) days prior to the date of the initial hearing. Any opponent or respondent wishing to submit a

² In contrast, Section 2.204(f) of the Board of Appeals Rules of Procedure provides that "All individuals who are called to testify or desire to testify at a hearing shall sign their own name to the roster in favor of or opposed to the petition before the Board, as the case may be. If a hearing is continued, only the individuals who have signed a roster prior to the end of the Petitioner's case or are called by the Petitioner in rebuttal shall be permitted to testify." The Hearing Examiner roster now expressly states: "all parties, persons wishing to testify, or persons who will be called to testify as a witness or submit evidence must sign in before the end of the petitioner's or appellant's case, except for the Petitioner's rebuttal witnesses."

report or other similar documentary evidence to the hearing examiner must file a copy of the report with the clerk and send one copy to the petitioner at least ten (10) days prior to the date of the initial hearing. If technical reports are filed late, the hearing examiner may postpone the hearing to allow the other parties time to review the report, or take any other course of action as determined by the hearing examiner. Even if the report or other documentation is timely filed, the hearing examiner may postpone the hearing and require additional copies of the material for Technical Staff review.

Pursuant to this authority, I continued the hearing to allow Opponent St. Louis Church time to review the report.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. Legal Description and Zoning. The subject property is located in the 5th Election District on the west side of MD 108 (Clarksville Pike) about 1,600 feet south of MD 32. It is referenced on Tax Map 34, Grid 12, as Parcel 45 and is also known as 12540 Clarksville Pike (the "Property"). The Property is zoned RR-DEO (Rural Residential: Density Exchange Option).

2. Site Description. The 3.27-acre trapezoidal Property has about 200 frontage feet on MD 108. The southern lot line ("Perimeter 1" on the Amended Conditional Use Plan) is 675 feet in depth, the northern lot line ("Perimeter 3"), 605 feet, and the western rear lot line ("Perimeter 2"), 181 feet. The Property is currently improved with a single-family detached dwelling sited in the front, northern area. Behind the dwelling are several sheds and a gazebo within the 75-foot stream buffer running along the rear of the Property. These structures and the two existing gravel driveways will be removed for the proposed development.

The Property is wooded. The land drops in elevation from east to west (front to rear) and toward a portion of a perennial stream.

3. Vicinal Properties. To the north, the adjoining, 17±-acre, RR-zoned Parcel 196 is the site of the St. Louis Church complex, which includes a chapel, sanctuary buildings, a school building, and ancillary structures. The Amended Conditional Use Plan depicts an "existing house (rectory)" and attached garage lying about 54 feet from the common property line. Behind the rectory is what Opponent St. Louis Church calls a prayer garden (it is not shown on the conditional use plan.)

Beyond Parcel 196 is the POR (Planned Office Research) zoned Parcel 29, which provides access off Ten Oaks Road to the St. Louis Catholic Church complex. The POR-zoned Parcels 30, 32, and 34, also on the north side of Parcel 196, are improved with service uses. Beyond Parcel 34 is a B-2 (Business: General) zoned bank.

Across MD 108 to the east is the RR-DEO zoned Parcel 162, which is improved with a two-story single family detached dwelling set back more than 180 feet from MD 108. Surrounding Parcel 162 is the approximately 86-acre Parcel 88, a farm field. Further east, north of Guilford Road, are several B-2 zoned properties in service and retail use. The property across from St. Louis Catholic Church is the site of Clarksville Plaza is improved by a one-story retail center.

The southern adjoining, RR-zoned Parcel 47 is improved by a religious facility, a parsonage building, and parking lots approved in BA Case No. 03-030C as Christ Evangelical Lutheran Church of Columbia. The church is sited about 30 feet from the common lot line with

the Property. A fence runs along the common property lot with the Property. To Parcel 47's south is the 1.53-acre Parcel 48, which is improved by a one-story rancher; Parcel 199, a 2.7-acre parcel improved with a 1½ story single family detached dwelling, and; Parcel 418, a .92-acre parcel improved with a one-story single-family detached dwelling.

To the west is the 118-acre Parcel 77, which was approved for a 32-lot cluster subdivision, the Preserve at Clarksville. Several single-family detached dwellings in the 9,000-square foot range are under construction. A 42.44± acre, non-buildable Preservation Parcel with a wooded stream (a portion of which runs through the rear of the Property) buffers these dwellings and the proposed facility. The distance from the closest lot line in this subdivision to the Property's rear lot line is about 590 feet.

4. Roads. MD 108 has two travel lanes and a variable paving width within a proposed 80-foot wide right-of-way ("ROW"). According to State Highway Administration ("SHA") data, the traffic volume on MD 108 south of Ten Oaks Road was 16,783 annual average daily trips ("AADT") as of 2008. Visibility from the proposed driveway appears to be acceptable, according to the Technical Staff Report ("TSR"), with an estimated sight distance of more than 600 feet to the north and south.

5. Water and Sewer. The Property is served by private well and septic facilities.

6. General Plan. The Property is designated "Rural Residential" on the 2000-2020 Policies Map the 2000 General Plan. MD 108 is depicted as a Major Collector on the General Plan Transportation Map.

7. The Proposal. The Petitioner is proposing to construct and operate a facility on the Property (the "facility").

The Facility, Generally. The 25,390 square foot facility has a 16,000-square foot footprint. It would be 80 feet wide at the front (along MD 108), 60 feet wide at the rear, and 225 feet in maximum depth or length. The facility would be sited about 78 feet from MD 108. According to the original elevations submitted with the petition, the facility would be 37.5 feet high. It is designed or programmed to follow site topography, so the upper floor would be generally level with MD 108. A porte cochere and projecting, octagonal main lobby at the facility's front would provide access

The lower floor would be built into the sloping hillside; as a result, the back section is substantially lower in elevation. A portion of the rear section on the facility's north side would project about 20 feet from the main facility. This projection accommodates a tower, vestibule, and stairway. Extending beyond these features, toward the rear property lines, is a chapel and loadout/carport.

A dumpster is proposed to be located in the Property's southwest corner. Jay Donaldson agreed that no pickups would occur between 9:00 p.m. and 9:00 a.m.

The Funeral Home. Three 20-ft. by 32-ft. visitation/viewing rooms are proposed on the upper floor. Also on the upper level are multiple rooms for casket display. There are also rooms for storage, offices, public and private bathrooms, and an employee lounge.

The south side of the lower floor plan is dominated by a large garage, an employee lounge, bathroom, and several small rooms for the funeral business operation. On the north side is a

reception center, a catering room (no kitchen) and several small rooms for the funeral business operation.

The Chapel. The Petitioner is proposing to construct a chapel, vestibule and overflow area on the lower level with 152 fixed seats and four disabled seats and a loadout/carport area.

Driveways and Parking. The Amended Conditional Use Plan depicts a 35-foot wide driveway entrance about 38 feet from the Property's northeast corner. A 15-foot wide section provides ingress into the Property. Two 10-foot wide sections provide egress to the north and south. The driveway becomes an internal drive aisle running along the Property's north side past a row of 13 parking spaces along the facility's upper floor. Beyond a plaza bump-out along the lower floor, is the main parking area. A total of 66 parking spaces are provided, including five disabled spaces.

Requested Reductions in the 50-foot Setbacks for Buildings, Parking Areas and Outdoor Activity areas, Per Zoning Regulation Section 131.N.22.d. The funeral home conditional use category imposes a 50-foot setback for these uses when they adjoin residentially zoned properties other than public road rights-of-way. Upon the petitioner's demonstration of compliance with certain screening/buffering criteria, the Hearing Examiner may approve a reduced setback. The Petitioner in this instant case is seeking approval to reduce the 50-foot setback from the RR-zoned Parcel 196, the site of St. Louis Church, and from the RR-zoned Parcel 47, the site of the Christ Evangelical Lutheran Church, to the maximum allowable 30 feet (the minimum setback in the RR zone).

The petition states "[e]xtensive landscaping will be installed at the perimeter of the subject

property to minimize any impact of the use on vicinal properties. The Amended Conditional Use Plan notes the perimeter landscaping schedule.

- Perimeter 1: (the south lot line and common property line with the Christ Evangelical Lutheran Church): a Type "A" buffer (light).
- Perimeter 2: (the west lot line): a Type "C" buffer (heavy)
- Perimeter 3: (the north lot line and common property line with St. Louis Church: a Type "A" buffer (light)
- Perimeter 4A: (front): a Type "E" buffer (parking buffer)
- Perimeter 4B: (front): a Type "B" buffer (moderate).

The Antique Hearse Museum. The Petitioner is also proposing to utilize a portion of the garage to house his antique hearse collection.

Employees. There will be four employees.

Lighting. Robert Vogel testified to the use of low level lighting, probably nothing higher than a 12-foot pole with directional lighting down and away from adjacent properties (shoebox type lighting with cutoffs). The petition states lighting will comply with the Zoning Regulations and will be directed down and away from adjoining properties.

Dumpster. A dumpster is proposed to be located in the Property's southwest corner. Jay Donaldson agreed to no pickups between 9:00 p.m. and 9:00 a.m.

Hours of Operation³. The operating hours for the business and viewing components of the facility are as follows.

Business Hours: Monday-Friday 9:00 a.m. - 5:00 p.m.
Saturday 9:00 a.m. - 4:00 p.m.
Sunday 11:00 a.m. - 4:00 p.m.
Viewing Hours: Monday-Sunday 2:00 p.m. - 4:00 p.m. & 7:00 p.m. - 9:00 p.m.

³ The hours for chapel services are discussed below.

In addition, the viewing accommodation needs of a particular client may require a variation from these hours, but no viewings will be permitted between 9:00 p.m. and 9:00 a.m. One or two employees might transport a decedent to the facility at night in a Chevy Suburban or van. All visitors and employees will leave the facility by 9:30 p.m.

Area Property Testimony and TSR Comments

8. **State Highway Administration Comments Attached to the TSR.** On February 3, 2010, SHA commented it had no objection to the conditional use request subject to the condition that “[t]he applicant will be required to obtain and meet all the terms and conditions of an access permit issued by this office.”

9. **Testimony of Robert Vogel.** In his direct testimony, Mr. Vogel provided a general description of the uses in the area. During his rebuttal testimony, he testified in more detail about these uses, explaining the testimony and evidence contradicts Mr. Iraola’s direct testimony and evidence about the residential character of the area. He introduced into evidence Petitioner’s Exhibit 5A-P, 16 photographs. These photographs depict several structures and uses along MD 108. These include the properties north of the Property, including the Bank of America structure, a television/satellite service station, a realty office, and multiple photographs of the many St. Louis Church structures as well as the main signalized access and pathway to the priests’ residence. Others depict the Christ Lutheran Church structures. Additional photographs depict the properties beyond the church: a home-based acupuncturist, a small one story residence, another residence, a home-based dentist office, a home-based Reiki healing practice, and a home-based doctor’s office. Mr. Vogel noted existence of multiple home-based occupations along this

section of MD 108. Referring to Petitioner's Exhibit 5L and 5N, he explained they depicted two residences with no apparent additional land use and are setback from MD 108 and buffered by vegetation. He opined it would be difficult to combine them with a view of the proposed facility.

Traffic Performance Standards/Safe Ingress and Egress/Turning Lanes⁴ Testimony

10. **Testimony of Robert Vogel.** Petitioner Witness Robert Vogel, an engineer, testified that the Amended Conditional Use Plan depicts a small acceleration lane connection to the Christ Lutheran Church deceleration lane.⁵ The Amended Conditional Use Plan also depicts the MD 108 ROW, which shows the availability of additional land for this lane, if needed. On cross-examination, Robert Vogel testified the St. Louis Church site development plan indicates the availability of sufficient ROW along the entire length of the property if additional footage is needed. During cross-examination, he further testified to the availability of sufficient area along MD 108 for a bypass or turn lane if required at a later phase because the opposite side of MD 108 has a 20-foot ROW from the centerline of the road.

In his rebuttal testimony, Mr. Vogel referred to Petitioner's Exhibit 9, SHA Plat # 59062, which in his view somewhat contradicts his prior testimony about the existing width of the ROW. After reviewing the two plats, he is not sure if the available ROW is 20 or 26 feet. However, he

⁴ "Turning Lanes" is a SHA collective term for deceleration, acceleration, bypass and left turn lanes. See State Highway Access Manual, available at <http://www.marylandroads.com/OHD/accesspermits.pdf>. As the Access Manual informs readers, turning lanes are an important element of site access improvements because they allow speed changes and turning maneuvers to occur outside of the normal flow of highway traffic, which reduces rear-end collisions at the access point and helps to maintain through traffic flow on the highway.

⁵ Mr. Vogel was not asked to state his occupation. His firm, Robert H. Vogel Engineering, Inc., prepared the Amended Conditional Use Plan. The Plan also depicts his seal as a certified registered engineer in Maryland. He has regularly appeared before the Hearing Examiner as a civil engineer/land use expert.

spoke to SHA and determined that if the ROW was 20 feet, the Petitioner could still provide a center line adjustment for a bypass lane or turn lane, if warranted, by using a few frontage feet.

11. **Testimony of Mickey Cornelius.** Petitioner's witness Mickey Cornelius, a registered traffic engineer, testified to having completed a preliminary evaluation of the site (the "access study") in terms of meeting the traffic performance standards of the conditional use, including sight distance for traffic safety, safe access, and acceleration/deceleration requirements.

Sight Distance Testimony. Mickey Cornelius testified that using a 55 MPH design speed, the site required a sight distance of 606 feet in both directions to meet State Highway Administration ("SHA") sight distance criteria. (MD 108 is a state road.)

Acceleration/Deceleration Lanes Testimony. Referring to the Amended Conditional Use Plan, Mickey Cornelius testified to it showing an additional 12-foot wide area in front of the site to accommodate acceleration and deceleration lanes, with additional land to the north to construct a longer deceleration lane, which SHA will require. On cross-examination, Mr. Cornelius testified to being the traffic engineer for the Christ Lutheran Church project. In that project (which required conditional use approval), the SHA recommended a 425-foot long deceleration lane, with a 16-foot width for bicycle safety.

Safe Access Testimony. Mickey Cornelius testified the access study was based on a single point of access, and does not reflect the amended plan showing a dedicated 15-foot inbound and two 10-foot egress lanes. However, the revised access is a typical commercial access design. There is sufficient area for a longer 12-foot wide lane deceleration lane meeting SHA length requirements to the north along St. Louis, and for an acceleration lane meeting SHA length

requirements that would tie-in to the Christ Evangelical Lutheran Church of Columbia deceleration lane.

Left Turn/Bypass Lane Testimony. Mickey Cornelius testified SHA would require a left-turn (northbound) or bypass lane. The Conditional Use Plan indicates there is sufficient ROW land available on the east side of MD 108 to meet this requirement.

Traffic Safety. According to Mickey Cornelius, who reviewed the number of proposed employees and traffic generated by the use, the proposed facility would not cause unsafe conditions and the additional traffic would not have any additional impact on traffic safety based on the access required. To support this conclusion, Cornelius noted cars already make safe left turns out of the Christ Evangelical Lutheran Church onto northbound MD 108.

Rebuttal Testimony. Mr. Cornelius opined on rebuttal that a turn lane or bypass lane could be provided based on his experience and knowledge. However, it is unclear whether either lane is needed because the percentage of left turning vehicles is less than 5 percent of the total traffic volume. If there were no bypass lane, he would have no concerns about safe access. He noted that the Christ Lutheran Church's failure to obtain additional land at SHA's request for ROW, has resulted in no reported traffic accidents, based on SHA accident data.

The primary access concern for the Property is sight distance at an unsignalized access point. This would not be a problem for funeral processions, because traffic would be stopped, which creates a de facto signal. Moreover, any backup problems are caused by the traffic signal to the north. He opined the volume of left-turns would be small during a peak hour for two reasons: first, no services or viewings will be held between 4:00 p.m. and 6:00 p.m., and secondly,

the project proportional distribution of traffic is 35 percent from the north and 65 percent from the south.

12. **Testimony of Norman Belden.** Opponent Norman Belden introduced into evidence three videos he made at various times, which are intended to depict the traffic levels and congestion at MD 108 and Guilford Road (Opponents' Exhibit 8). Mr. Belden made two videos on March 25, 2010 (a Tuesday), the first at 4:00 p.m., and the second, at 5:50 p.m. These videos depict traffic stopped on northbound MD 108 in front of the proposed facility and up to Ten Oaks Lane. The line appears to clear upon when signal change at Ten Oaks Lane and/or Route 32. Southbound traffic moves smoothly. Opponent Belden made the third video on April 4th at 12:30 p.m. (Easter Day). Traffic is backed up in the northbound lane until a signal change. Numerous vehicles exit Saint Louis Church onto northbound MD 108 or cross MD 108 to Guilford Road. Multiple cars can be seen entering St. Louis Church via a deceleration lane. Southbound traffic flows smoothly. Several persons can be seen leaving the church and walking across MD 108 to Guilford Road.

13. **Testimony of Patrick Marlatt.** Opponent St. Louis Church witness Patrick Marlatt, testified to being a parishioner and Corporator of St. Louis Church, a full-time faculty member of the Fire and Rescue Institute at the University of Maryland College Park, and for 16 years its director. He also serves a volunteer for the Clarksville Fire Department. He testified to

traffic backing up one-half to three-quarters of a mile along MD 108 south of Guilford Road that the size of the proposed facility would have a greater impact on traffic safety.⁶

He introduced into evidence Opponents' Exhibit 12, SHA Plat #52696. The plat information block states the plat was made for the Maryland Route 108 – thru Clarksville right-of-way project and sent to the (Land) record office on September 25, 1990. He conducted a deed search, traced the title, and found the deed for the parcel of land depicted on the plat (Jeanne C. Hoddinott, trustee). Because his deed search found no additional transfers from the Hoddinott family, he concluded it is the most current land record.

According to Mr. Marlatt, the data on the plat disputes Mr. Vogel's testimony that there is 26 feet of ROW available to construct the SHA-required bypass or left turn lane. He asserted the SHA requires a 16-foot wide deceleration lane and not the 12-foot width shown on the plan and as testified to by Messrs. Vogel and Cornelius. He marked two notations on the plat, one referring to a 26-foot distance deed call, the second to a 19.82-foot distance deed call. Mr. Marlatt therefore opined the plan mistakenly shows a 26-foot ROW, because the correct ROW is 19.82 feet. In support, he referred to the Hoddinott deed call block data on the plat. This data, he suggested, refers to a 6.18 foot section of the "ROW deed call," which he concluded means the Petitioner lacks the necessary ROW to both a left-turn/bypass lane and a 16-foot wide deceleration lane required by SHA.

⁶ Until I ended the practice, Mr. Marlatt referred to a video or group of photographs displayed on the wall by Opposition counsel during his testimony. These images were not introduced into evidence. Consequently, any findings from Mr. Marlatt's testimony are considered only to the extent that they can be appreciated independently of this background show.

14. **Testimony of Scott Erickson.** Authorized to testify on behalf of the Clarksville Overlook Homeowners Association (Opponent Exhibit 9) Opponent St. Louis Church opponent witness Erickson explained that traffic along MD 108 backs up every day. He was concerned that without a bypass or turn lane, motorists needing to, but unable to make a left northbound/ left turn on MD 108 would make a right turn and then use Prestwick Drive or MacBeth Farm Lane to make a turnaround.

15. **The Hearing Examiner's Observations.** The Hearing Examiner made two site visits. My first visit occurred during rush hour (around 5:15 p.m.) Because I was unable to pull over in front of the site or make a U-turn, I continued south, then turned around in a side street and made a right hand turn to northbound MD 108. Although I pulled over to the east side of MD across from the Property, the traffic levels caused me to move my vehicle to another location and walk back to the site. My second visit occurred around 2:00 p.m. on a Monday afternoon. Traffic was very light along this section of MD 108. The Hearing Examiner routinely travels along this portion of MD 108.

Parking Testimony

16. **Technical Staff Report Comments.** According to the TSR, 10 parking spaces are required for each of the three viewing rooms and one for each of the four employees (34 parking spaces). No additional parking spaces are required for the chapel because it is an accessory use customarily associated with a funeral home operation.

17. **Testimony of Robert Vogel.** Robert Vogel testified to the proposed use meeting county parking regulation requirements, 10 spaces per each viewing room plus the number of

employees (four). Although the regulations do not require a specific amount of parking for the chapel, interviews with the Petitioner about its existing funeral homes led to the conclusion that from an operational standpoint, one parking space is required for every three chapel seats, resulting in 50 additional parking spaces for the proposed 152 seats. Consequently, 66 parking spaces are proposed.

18. Mr. Vogel rebutted testimony that there is inadequate parking. The plan proposes more than the parking regulations require. Additionally, there is additional space in the possible storm water management area for parking spaces. Expressing disappointment that county staff recommended against a walkway between the facility and Christ Lutheran Church, he maintained it would be a good idea to have an informal parking agreement with the church for the rare overflow.

Concerning opponent testimony about parking problems observed at the Witzke funeral home in Columbia, he emphasized that the decedent was a popular teacher.

19. **Testimony of John Gary.** Having testified to being the designer of the Donaldson funeral home in Laurel, he stated the 65 parking spaces provided would serve the facility well.

20. **Testimony of Jay Donaldson.** It was Jay Donaldson's testimony that more parking than required is being provided based on the parking needs of his other funeral home operations and that the total number of parking spaces would be sufficient. It was unlikely that a service and three viewings would occur simultaneously.

For funeral processions, up to 65 cars would be queued up in the driveway before exiting. It takes about one to two minutes for a procession to exit a site. Most chapel and funeral

processions would take place in the morning. During cross-examination, Mr. Donaldson testified that in the event of any parking problems, visitors would be directed to another site or cars would be lined up in front of the garage. His business sometimes calls for off-duty police to manage traffic at a family's request.

Describing how parking is handled at his funeral home in Laurel, he explained that 60-63 parking spaces are provided for a 16,000-sq. ft. funeral home and a 132-seat chapel on a site slightly less than two acres. The Donaldson funeral home facility in Odenton has a 170-seat chapel and 60-63 parking spaces. Parking is rarely a problem. When a larger crowd is expected in Odenton, people are directed to park on the unmarked spaces in front of the garage. In Laurel, neighbors across MD 198 allow the funeral home to use their property. At the two other Donaldson Funeral Homes, there may be religious services after a visitation. About 75 out of the 300 or so funerals held at their funeral home in Laurel included a chapel service. Sometimes the chapel is used for an evening visitation when there is a next day cremation because the visitation rooms are a little smaller.

Rebuttal Testimony of Jay Donaldson. Rebutting opposition testimony about the possible use of the adjoining church properties for offsite parking, Mr. Donaldson testified that a large funeral is unusual. At his other funeral homes, when more cars come to a funeral, staff help attendees park along the parking islands on site, by garage doors, or attendees are directed to use a nearby parking lot. He would want to encourage parking on Christ Lutheran Church.

21. **Testimony of Catherine Stefano and John Stefano.** Opponents Catherine Stefano and John Stefano testified to making an empirical study of parking at area funeral homes,

as set forth in Opponents' Exhibit 11.⁷ The Stefanos looked up visitation/funerals hours listed in newspapers, apparently, and then counted cars entering and leaving at the funeral home, or parking offsite, and the number of persons in each car. The parking data includes six visits to five funeral homes.⁸

Based on these visits, as depicted graphically in Opponents' Exhibit 11, the Stefanos determined most people travel alone to a funeral home for a viewing or service. Based on this information, they opined the number of parking spaces provided for visitations at the proposed funeral home (10 per viewing room) is inadequate. In their opinion, the parking needs analysis should assume the simultaneous use of all three visitation rooms, not just one or two as the Petitioner asserted.

22. **Testimony of Joan Lancos.** Opponent St. Louis Church called witness Joan Lancos, who identified herself as a former member of the planning commission. She testified to visiting three funeral homes in Howard County, sometimes during a viewing, to study the size of the interior spaces, and especially the size of viewing rooms. The homes she visited were the Witzke Funeral Homes in Ellicott City and Columbia and the Kaufmann Funeral Home in Elkridge. In some cases, the required parking appeared adequate for the number of visits based on the number of viewing rooms. At other times, it did not. During cross-examination, she testified that the overflow parking observed at the Witzke Funeral Home in Columbia was for an area

⁷ On objection. I excluded data from the Donaldson funeral home in Laurel, because it is not located in Howard County.

⁸ These were the Witzke Funeral Home on Twin Knolls Road in Columbia (two viewing rooms), the Witzke Funeral Home on Old Columbia Road in Ellicott City, the Slack Funeral Home in Ellicott City (apparently a

teacher. She also observed the proposed funeral home does not include parking for potential caterers affiliated with the family kitchen and reception area. In conclusion, she questioned the adequacy of the 66 parking spaces proposed for the use.

23. **Testimony of Monsignor Luka.** Monsignor Luka argued the parking is inadequate and that people will look elsewhere for parking, including St. Louis. If they park there, they would walk across the lawn and intrude on his privacy, there being no parking on MD 108. He noted that the church has safety cones to block access to the site at certain times because people already drive through the property.

24. **Testimony of Patrick Marlatt.** Mr. Marlatt opined the parking was inadequate for the use. Referring to Opponents' Exhibit 14, an engineer-prepared drawing showing the necessary turning radius of a fire truck, he explained the drawing indicates that two of the 66 parking spaces would be lost. The parking calculations fail to include parking for caterers, based on Mr. Donaldson's testimony that there may be after service receptions.

Chapel Hours and Related Testimony

25. **Testimony of Jay Donaldson.** In his direct Testimony, Mr. Donaldson testified that most chapel and funeral processions would take place in the morning. He also thought it was unlikely that a chapel service and three viewings would occur simultaneously. The purpose of the proposed chapel is to provide memorial services for persons who choose not to hold service in a religious facility. No services would be held on Saturday evening or Sunday morning because cemeteries do not perform internments at these times. All services will conclude at 9:00 p.m. and

former private dwelling with one viewing room), the Kaufman Funeral Home in Elkridge (two viewings at the

the public must be off the lot at 9:30 p.m. He stated that his company has told persons who need more space or different service times to go elsewhere. During rebuttal, he opined that attendees who do not attend a local church would not be able to use the chapel for services would experience a substantial burden on their religion exercise.

Priests' Residence Testimony

26. **The TSR.** In relation to its positive evaluation of the Petitioner's request for reduced setbacks, subject to certain landscaping conditions, the TSR informs us the adjoining Parcel 196, the site of the St. Louis Catholic Church, was developed through multiple Board of Appeals decisions and orders, including BA Case Nos. 01-031C, 04-011C and SDP-03-064. Technical Staff found no SDP or any evidence that the structure identified in the conditional use plan as the rectory was approved for residential use on a separate parcel or that a residential lot was created for this purpose. Because the structure occupies a part of Parcel 196, and is depicted on SDP-03-064 as part of Parcel 196, Technical Staff concludes the structure exists as an accessory use to the principal use of the parcel as an "institutional use religious facility."

27. **Testimony of Monsignor Luka.** Monsignor Luka disagreed with the TSR statement that the priests' residence is an institutional use. He argued he and the other priests have rights as individuals and taxpayers under the law and that the TSR statement treats them as second class citizens. The residence has bedrooms, studies and bathrooms for each priest. There is a deck on the back of the home. There are no church offices in the residence. There is a clear distinction between the residence and offices to ensure some separation between the residence and

same time), and the Donaldson Funeral Home in Odenton.

the church use. The residence was built on the site of a former residence. The church purchased the lot and demolished the existing residence for the priests' residence.

28. **Testimony of Robert Vogel.** In his rebuttal testimony, Mr. Vogel contradicted opposition testimony that the priests' residence was a residence use, not an institutional use as the TSR concludes. Referring to Petitioners' Exhibit 6, a December 8, 2005 site development plan for St. Louis Church (SDP-03-64), he explained the site data parking tabulations includes parking for the priests' residence in the total parking for the development. He also quoted SDP General Note 36, which states the "[e]xisting priests' residence is used as a residence as well as for consultations and meetings with members and/or affiliates of St. Louis Church." He also pointed out the location of a future parking area just to the north of the priests' residence. Although it does not exist today, there is temporary bituminous curb for the future tie-in. He also noted the future parking ties in with the priests' residence parking and driveway.

Referring to Petitioner's Exhibit 6, a May 4, 2001, deed of consolidation and merger, he explained the deed consolidated two parcels owned by the Roman Catholic Archdiocese, including the property on which the priests' residence is sited. According to the deed, that parcel had been conveyed to the church in 1997. He opined in reference to Petitioner's Exhibit 7, a forest conservation easement plat on St. Louis Church property (Plat #16467 for SDP-03-064), that some of the forest conservation appears to be located on the property merged in the consolidation deed. Based on this evidence the principal use of Parcel 196 is religious, a church and its ancillary activities. Consequently, the priests' residence is an accessory structure.

Adverse Impact Testimony

29. **Testimony of Robert Vogel.** Mr. Vogel testified there would be no atypical adverse effects occasioned by the location, the structure's height, walls, fences, and the nature and extent of landscaping would not hinder or discourage the use of adjacent land and structures more at the subject site than it would generally elsewhere in the zone.

Mr. Vogel rebutted testimony that adverse affects must be presumed because there is no lighting plan. In his opinion, the light would have no atypical adverse impacts on the two adjoining institutional uses. He stated the parking lot lighting would consist of 12-foot high shoe box lighting with cutoffs and bollard lights for parking near the structure.

30. **Testimony of Jay Donaldson.** Mr. Donaldson rebutted testimony that fumes or the lack of information about fumes would cause adverse impacts on St. Louis Church. Concerning the use of fumes or odors caused by the use of Formaldehyde, he explained the danger is to embalmers. It dissipated in the open area and he knew of no problems when it is released into the air. At his Laurel location, Formaldehyde is ventilated through an exhaust system near the apartment above the funeral home.

31. **Testimony of Patrick Marlatt.** Mr. Marlatt testified the facility is intended to accommodate large funerals. Any reduction in the 50-foot setback would interfere with the privacy needs of the priests' residence/rectory and interfere with the priests' use and enjoyment of the property because it pushes the use on top of the prayer garden. He opined the use would have adverse lighting effects because none is shown on the plan.

32. **Testimony of Monsignor Luka.** Monsignor Luka testified the proposed use and especially the close location of the drive aisle would have an adverse impact on the use and enjoyment of the prayer garden, which is located to provide some privacy from the other uses on the site.

33. **Testimony of Michael Staiano.** Petitioner rebuttal witness Michael Staiano testified to having a bachelor's degree in engineering and post-graduate credits. He is a licensed mechanical engineer and has testified as an acoustical engineer expert witness in Howard County.

Petitioner's Exhibit 4 is the April 19, 2010, Funeral Home Driveway ("Drive Aisle") Preliminary Vehicle Noise Estimation study he prepared for the proposed funeral home. The study estimates projected sound levels (decibel levels or "dB") generated from vehicles traveling along the drive aisle on the north side of the funeral home and MD 108. The traffic sound levels, or noise predictions, from funeral home drive aisle traffic were estimated at two locations close to the St. Louis rectory garage (the nearest points) and about 115 or 125 feet distant from the drive aisle (Locations 3b-c). The noise predictions are based on the following conditions: average daily traffic—150 vehicles; an hourly average of 12 light vehicles per hour and 120 light vehicles maximum, traveling at a maximum speed of 20 MPH. Additionally, the noise predictions for MD 108 are based on existing 2009 afternoon traffic conditions. The study ignores topography and background noise and sound from the 13 parking spaces next to the facility.

The study estimates the A-weighted dBA⁹ drive aisle sound levels to be 42 dBA, with maximum movements at the closest positions to the rectory. In comparison, MD 108 traffic is estimated to be 60-62 dBA at the rectory. The noise projections indicate that (1) noise from vehicles traveling through the funeral home drive aisle is unlikely to be intrusive, and likely, often inaudible, near the rectory, and (2) the drive aisle noise at the rectory at the study points will likely be 20 \geq lower than MD 108- generated noise. It concludes the estimated sound levels would not require mitigation under the Howard County Design Manual ("DM") or rise to the level of noise abatement criteria under the Federal Highway Administration ("FHWA").¹⁰

In his cross-examination testimony, Mr. Staiano testified the study does not factor in car doors slamming or impulse sounds (sounds of a short duration), only vehicle movement. He did not consider the noise from the perpendicular parking area or the starting of cars, because he was trying to maximize the noise of moving vehicles. Nor did he factor in any intervening amplification, such as noise bouncing off a stone wall, because these sounds have no consequence in terms of sound levels. He further noted that the difference between 62 and 42 dBA is logarithmic, meaning that a "bel" is a tenfold difference in sound level.

He did not generate noise levels at the site of the prayer garden because it was not on the Conditional Use Plan. He further testified to seeing a worn out bench from where he stood on the subject property. He opined the area was not a peaceful location to pray and meditate in private

⁹ As Mr. Staiano explained, A-weighted decibels express the relative loudness of sounds in the air as perceived by people. The weighting system reduces the decibel value of low frequency sounds, because people are less sensitive to them.

¹⁰ Page 3 notes FHWA criteria apply only to highway design; however, they are a useful general guide to the acceptability of traffic noise exposures.

because of the nearby rectory air conditioners and the large parking apron next to the garage. Because he could hear noise from MD 108 from where he stood, he opined more noise could be heard in the prayer garden area because it sat at a higher elevation.

34. **Observations of the Hearing Examiner.** Because I did not observe the prayer garden during the site visit before the first day of hearing, I revisited the site with no objection from either party prior to the last hearing day. Just next to the very large parking pad is a small bench below a few pine trees (whose lower limbs had been removed), two religious figures, a hydrangea plant, and some potted flowers. There also appeared to be a bird fountain.

Landscaping/Buffer for Requested Reduced Setback
(Section 131.N. 22.d), Testimony & TSR Comments¹¹

35. **TSR Comments.** The TSR comments on the Petitioner's request for a reduced setback pursuant to Zoning Regulation Section 131.N.22.d are based on the initial December 2009 Conditional Use Plan. The TSR initially observes the petition states "[e]xtensive landscaping will be installed at the perimeter of the subject property to minimize any impact of the use on vicinal properties." However, the plan's landscaping notes depict only the minimum buffer required by the Howard County Landscape Manual, a Type A landscape, and does not include a detailed plan for screening as required. The TSR recommends approval, conditioned on a site design that allows for 1) a six-foot minimum privacy fence or masonry wall and a Type E

¹¹ As discussed below in Part III, Section 131. N.22.d requires buildings, parking areas and outdoor activity areas to be sited at least 50 feet from adjoining residentially-zoned properties other than public road right-of-ways. The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater, if (1) The adjoining land is committed to a long term institutional or open space use that provides an equivalent or better buffer for vicinal residential development or, (2) the petition includes detailed

landscape buffer on the north side, extending from the area closest to the road to at least the end of the parking area, and 2) at least a Type D landscape buffer on the south side of the Property from the area closest to the road to the end of the proposed building on the Property.

36. **Testimony of Robert Vogel.** Robert Vogel explained the Amended Conditional Use Plan depicts a Type A Landscape Manual buffer along the common property line with St. Louis church. It also depicts a solid fence and landscape buffer along a portion of the common property line with St. Louis Church. He met with members of St. Louis Church or Monsignor Luka to discuss the buffer/landscape between the two properties. Petitioner's Exhibit 3 comprises four images of six-foot privacy fences that might be constructed to buffer the driveway aisle and parking within the reduced setback. A fifth image depicts a row of Leyland Cypress evergreen hedge intended to show how dense a screen could be provided. He stated the combination of fence and landscaping would provide an attractive and effective buffer and screen for the facility. He also discussed the possibility of constructing an earthen berm on the adjoining property to augment the height of the fence and landscaping.

When questioned about the requirements for a Type E landscape edge buffer during cross-examination, he stated the county prefers a 20-foot buffer width for a Type E landscape buffer, but that landscape edges can be accomplished in less than twenty feet. A twenty-foot wide buffer is probably not achievable on the Property near the proposed septic area because the county health department does not like large plantings in the septic area. He noted the health department approved a variance to reduce the septic setback from the property line from 10 to 5 feet.

plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent

Mr. Vogel rebutted testimony that the proposed conditional use was subject to Section 131.N.22.d.(2). He believed the proposed use is subject only to the buffer requirements of Section 131.N.22.d.(1) because the adjoining property is a religious, institutional use. Nonetheless, the Petitioner made an offer to St. Louis Church to establish a buffer along a portion of the common property line, including the proposed fence and landscaping. If necessary, the trees shown on the common property line could be moved back.

37. **Testimony of Miguel Iraola.** Regarding the proposed screening proposed to support the Petitioner's request to reduce the 50-foot parking and drive aisle setback to the 30-foot minimum permitted, Opponent St. Louis Church witness Mr. Iraola testified the 125-foot deep, 5-foot wide, Type A landscape buffer is inadequate by design. It cannot accommodate the 25 Leyland Cyprus trees, which are to be planted on the common property line, resulting in an increased trespass on the St. Louis Church property as the trees mature. The proposed 6-foot high privacy fence would be vulnerable, based on the growth rate of the trees, and would not adequately screen the use. Additionally, the trees would lose their lower branches over time.

In his opinion, the proposed landscape/privacy fence/Type A landscape buffer does not comport with the "screening" requirement imposed by Section 131.N.22. He claimed the term "screening" must be defined in accordance with the Howard County Landscape Manual definition because the Zoning Regulations do not define screening.¹² To comport with the Landscape Manual definition, the Petitioner should provide a Type D landscape buffer and an articulated

combination, that presents an attractive and effective buffer for neighboring properties.

¹² Opponents' Exhibit 2, Page 5 quotes the Landscape Manual definition: "Screening is the use of landscape materials to substantially shield a structure or use from view."

masonry wall, which would buffer noise, including truck beeping and tire noise from the use and be more attractive because it is less linear and repetitive.

38. **Testimony of Monsignor Luka.** Monsignor Luka testified that the landscape plan for the reduction in setback along the common boundary line will not provide an effective and attractive screen. The fence is inadequate since it will not protect privacy. The trees will turn brown because they will not receive enough sun. He objected to the trees being planted on the property line. Additionally, the prayer garden, which was located to provide some privacy, will be negatively affected by the growth of the Leyland Cypresses.

Compatibility Testimony

39. **Testimony of Robert Vogel.** Describing the area, Mr. Vogel testified the properties south of the Lutheran church include a now vacant assisted living facility, a home business (some kind of healing center), a family doctor practice, a physician, and some contractors. As he understands the compatibility criteria for the conditional use category (set forth in Part III), the test is simply that, compatibility of scale and character, not comparison. Compatibility of scale involves more than a comparison of square footage; it includes several factors, including height, number of stories, and width. The height and scale of the building make it compatible with the rectory because the facility's height would not overwhelm the rectory, which is about 160 feet distant. The facility would be 80 feet wide, which makes it compatible with the rectory, which is about 130 feet wide as viewed from MD 108. During cross-examination, he stated the Christ Lutheran Church parsonage was smaller than the facility. The residence across MD 108 on Parcel 97 is smaller. In his cross-examination testimony, Robert Vogel opined the

facility could be compatible with a smaller structure, like the small residence across MD 108, because it is surrounded by a large parcel.

40. **Testimony of John Gary.** Petitioner's witness John Gary, the funeral home architect, testified to having broad experience in designing funeral homes. The facility is designed to present itself as a one-story structure from the front (MD 108). He contrasted this with the rectory, which is about 130 feet wide facing MD 108. In his opinion, the facility would be compatible with the adjacent rectory because it is similar in height and scale, because fenestration and other features break up the facility's bulk and because the construction is designed to "step down" with the inclined slope to further reduce its visual impact. The 160-165 foot distance between the facility and the rectory also contributes to compatibility. In his professional opinion, the funeral facility would have no material impact on the viewshed. He furthered opined the rectory is less compatible with vicinal residences because it is much broader along MD 108 and that the proposed facility is more compatible with very nice subdivisions in the area.

41. **Testimony of Miguel Iraola.** Opponent St. Louis Church witness Miguel Iraola testified to being a Maryland licensed landscape architect and a principal in the landscape design and site planning firm Hord Coplan Macht. He has more than 20 years of experience in site planning and landscape design. During cross-examination, he stated he had never testified at a hearing on a Howard County conditional use petition or about conditional use compatibility standards, but had testified at special exception hearings in Montgomery County.

He reviewed the petition in this case, the testimony from the previous hearing, the Howard County Landscape Manual and studied the vicinity. Referring to Opponents' Exhibit 2, he

explained the first page was an aerial view locating residential properties within a quarter-mile radius of the Property (the "study area"). The data on this page includes lot size and dwelling size and age information for the 20 properties within the study area taken from state tax records (apparently the Maryland Department of Assessments and Taxation Records Real Property search engine). The second and third pages are photographs of the 20 properties. Miguel Iraola stated the 20 dwellings are four-square, split level or colonial in design, one or one or two stories in height, brick or siding construction, with the long façade of each dwelling generally facing either MD 108 or Guilford Road. No dwelling has a cupola or predominantly vertical elements.

Mr. Iraola opined the proposed facility fails the compatibility test. It is 10 times the average size of the residential dwellings in the study area, which he referred to as the "traditional Clarksville crossroads," its orientation is perpendicular, and the building materials and tower are more like a chapel than a residential dwelling.¹³

In his cross-examination testimony, he stated he did not derive his compatibility opinion based on a viewshed study, but on a test of certain criteria, including, height, scale, sameness, and materials. He made the photographs standing in front of each structure, but did make any image of the proposed structure in relation to the 20 buildings in the study area. He never studied the proposed facility in visual relation to the 20 properties in the study area. He admitted the #20 house on Guilford Road was not visible from the subject property. When questioned, he described his study as a comparative analysis.

¹³ Although the witness testified to reviewing the petition in this case and the testimony from the previous hearing, he was apparently unaware that the Petitioner introduced into evidence in its case-in-chief revised elevations eliminating the chapel spire.

During my questioning of Mr. Iraola about his testimony, I asked him to explain the justification for the quarter-mile study area, noting my unfamiliarity with any planning or design protocol for defining a neighborhood in such manner.¹⁴ Mr. Iraola stated the geography was subjective, but based on the location of a stream to the west of the subject property and stopped before Forest Glen, the new subdivision to the south along MD 108. He fleshed out his study area testimony by stating that he did not include the newer, bigger homes on Ten Oaks Road or further south on MD 101, because new homes are not part of the traditional character of Clarksville as a crossroads town.

When I questioned him further, he admitted to not knowing the planned service area boundary ran along a portion of MD 108 above the subject property and on the north side of Guilford Road. Nor was he aware the General Plan utilizes the Planned Service Area to delimit the land use policies area division between the East County (Columbia) and the Rural West.¹⁵

42. **Testimony of Al Ruebling.** Opponent St. Louis Church witness Al Ruebling testified to being a long-licensed Maryland registered architect whose clients include the Archdiocese of Baltimore.

¹⁴ Hearing Examiner Rule 10.1 allows the hearing examiner to use his or her experience, expertise, and knowledge of the property and the area in making a decision. Pursuant to this rule, I noticed my master's degree in city planning and Ph.D. in urban geography. I notice here my 20+ years as a practicing planner and academic prior to becoming an attorney.

¹⁵ Consequently, the properties south of Guilford Road and most of the property on MD 108 south of Ten Oaks Road are zoned RR, while the properties north of Guilford Road are zoned R-12. The Planned Service Area is also Howard County's designated Priority Funding Area.

He introduced into evidence five visual exhibits, which he explained were prepared using a software program (Sketch-Up) that allowed his staff to impose the Conditional Use Plan elevations, plans, and Google Earth information into various images.¹⁶

- Opponents' Exhibit 3, View South Toward Proposed Facility, depicts the visual relation between the priests' residence garage, the facility, and a 5-foot high fence.
- Opponents' Exhibit 4, View South of Existing Property, depicts the rear wooded area and the prayer garden in the shadow area
- Opponents' Exhibit 5, Ariel View North, depicts the location of the viewpoints in Exhibits 3 and 4
- Opponents' Exhibit 6, Ariel View Southeast, depicts the location of the viewpoint in Exhibit 7
- Opponents' Exhibit 7, View Southwest of Existing Property, depicts the view of the proposed facility from the rear deck on the priests' residence

According to Mr. Ruebling, the five exhibits demonstrate the disparity between the "volumetric character" of the proposed facility and vicinal residential development. On cross-examination, he defined "volumetric character" as the three-dimensional/cubic footage/spatial volume aspects of a structure. In his view, the large facility, with its taller ceilings and height, and its footprint, while intended to reduce the appearance of the structure's scale, was still large, comparatively, especially in relation to the 6,400 sq. foot priests' residence, which reads as a residence because of its volumetric character. It was therefore his opinion that the facility did not meet the compatibility test for the conditional use category.

On cross-examination, Mr. Ruebling admitted the facility met maximum height restrictions, but countered this admission with his opinion that its volumetric character makes it

¹⁶ On objection, I disallowed into evidence a map depicting the location of funeral homes in a 20-mile radius, as well as Mr. Ruebling's testimony about the use and design characteristics of same because it lacks probative value under either the general criteria for approving conditional use or the specific criteria for the funeral home conditional use category. See Footnote 24's discussion of the appropriate standard.

incompatible. It would not matter whether a portion of the structure was not visible. When questioned by Petitioner's counsel, he agreed as an architect that natural materials includes stone and masonry, which would make the facility compatible with the priests' residence, that the facility's fenestration was residential in character, that its shingled, hipped roof was residential in character, but that the port cohere and towers were not.

In response to my questions about his use of bird's eye, panoramic views (which utilize a wide-angle view of the viewed subject), and not classical perspective views, which would show vicinal structures in proportional relation to each other, he replied that panoramic or bird's eye views are good for showing a sense of difference between buildings.

CONCLUSIONS OF LAW

This is an exceptional conditional use case because the Hearing Examiner's decision turns on the resolution of three background issues. Is the priests' residence/rectory a residential principal use or an "accessory use" within the meaning the Zoning Regulations? Does the Hearing Examiner's discretionary authority to impose reasonable conditions on the grant of a conditional use petition encompass a requirement that the Petitioner provide or cause to be provided a left turn/bypass lane or a deceleration lane of a certain width and length on a state highway? May the Hearing Examiner require more parking than the minimum requirements imposed by Section 133 of the Zoning Regulations?

As a rule, I integrate the resolution of legal issues with the evaluation of a petition under Section 131.B and the pertinent Section 131.N.22 conditional use category. In some cases, I have reversed this order when clarity necessitates it. This case prompts me to take a third tack,

resolving certain background issues prior to making the necessary evaluations required by Sections 131.B and 131.N.22.

I. BACKGROUND ISSUES

A. Issue #1. Reduced Setbacks and the Land Use Designation of the Priests' Residence/Rectory

A first issue in this case is which Section 131.N.22.d standard applies to the Petitioner's proposal to reduce the setbacks from the residentially zoned Parcel 196, the St. Louis Church site. Not surprisingly, the Petitioner argues for the application of Section 131.N.22.d.(1) to the requested setback reductions, predicated on the characterization of the priests' residence as an institutional use accessory to the principal use of Parcel 196, an institutional religious facility.

St. Louis Church witnesses, on the other hand, testified to the residential characteristics of the priests' residence and the need to separate the residential component from the religious facility and school for privacy. For these reasons, their testimony in opposition to the proposed conditional use advances the claim that Section 131.N.22.d.(2) controls.

To resolve this matter, we start with the land use policy inhering in Section 131.N.22, the funeral home conditional use category. A funeral home may be proposed on RR-zoned property. If the proposed site adjoins another residentially zoned property, all buildings, parking areas and outdoor activity area must be set back at least 50 feet. This physical use setback establishes compatibility between a nonresidential and residential use.

Section 131.N.22(d) relaxes the physical use buffer under two different land use scenarios. First, Section 131.N.22.d.(1) authorizes a reduction in the 50-foot physical use buffer to the minimum zone setback where the funeral home site adjoins RR-zoned property in institutional or

open space land use. Under Section 131.N.22.d.(2), this use buffer transforms into an onsite landscape shield intended to visually buffer a funeral home when the adjoining property isn't an institutional or open space land use.¹⁷ This distinction is reflected in the Zoning Regulations definition of "landscaped area" in Section 103.112.

An area improved by vegetation and other natural or decorative materials, established or maintained for enhancement of the appearance of the site, noise reduction, buffering or screening. Areas used for buffering or screening are intended to provide a visual separation between uses as described below:

- a. Screening is the use of landscape materials to substantially shield a structure or use from view, to the extent possible given the topographic and other features of specific site.
- b. Buffering is the use of landscape materials to lessen the visual impact of a use, or to visually or physically separate uses, while not necessarily concealing a structure or use from view.

Section 131.N.22.d, however, is only one component of the statutory scheme controlling the buffering or landscaping of adjoining land uses in Howard County. Zoning Regulations Section 130.F.2.a requires a conditional use petition to show proposed landscaping. Section 130.I.1 informs a petitioner of the possible need to submit a Site Development Plan ("SDP") subsequent to the approval of a conditional use, per Section 16.155.(a) of the Howard County Subdivision and Land Development Regulations ("the Subdivision Regulations"). The SDP process, in turn, triggers the landscaping requirements of Subdivision Regulations Section 16.124, and thus, by statutory provision, the performance standards and guidelines of the Howard County Landscape Manual.

¹⁷ The land use policy reflected in Section 131.N.22.d is a long-established method of controlling potentially compatible land uses. See American Society of Planning Officials (now the American Planning Association), Zoning Buffers: Solution or Panacea, Information Report No. 133, April 1960. On file with the Hearing Examiner.

Pursuant to this statutory scheme, when a petitioner for a funeral home conditional use proposes a reduced setback, and when the petitioner at a later stage will submit an SDP, the landscaping shown on the conditional use plan serves a dual purpose: to represent the conditional use plan's compliance with the applicable reduced setback standard, and to depict the landscaping treatment called for in the Landscape Manual.

What impact does the dual functioning of the proposed landscape plan have on our resolution of the land use designation of the priests' residence? The Landscape Manual's self-stated focus, perimeter landscaping, is based on the "type of land use proposed and the compatibility of the proposed land use with adjacent uses." Landscape Manual, Page 13. These are broadly worded land use categories: single-family detached, single-family attached, mobile homes and apartments, nonresidential, and loading. Landscape Manual, Table 3, Page 19. If the priests' residence is treated as a residential, single-family, detached residential land use—a land use distinct from the non-residential religious facility institutional land use of Parcel 196--the landscape plan must meet—at a minimum—Section 131.N.22.d.(2)'s screening requirements as well as the more substantial residential perimeter landscape edge requirements imposed by the Landscape Manual.

Given that the 2000-2010 General Plan does not feature a land use map, for the purposes of Section 131.D.22.d and the Landscape Manual, the Hearing Examiner's resolution about the land use nature of priests' residence resides, in the last instance, in the Zoning Regulations. Our first stop is the Definitions section.

Section 103.A.147 defines a Principal Use or Structure as “[t]he main use of a lot or the structure used for the main function of a lot, as opposed to an accessory use or structure.” An accessory use or structure is “[a] use or structure which is incidental to, subordinate to, and customarily found in connection with a principal use or structure and which is situated on the same lot as the principal use or structure, except that where specifically provided in the applicable section of these regulations, accessory uses need not be located on the same lot.”¹⁸

The regulatory focus in both definitions is the parcel level; the principal use is the main use of the lot or parcel, and an accessory use situated on the same lot or parcel as the principal structure or use. The policy reason for this is to prevent a principal use that is prohibited or restricted in a zoning district from circumventing the regulations in the guise of an accessory use. Absent express statutory language in the Zoning Regulations or the Landscape Manual that accessory uses sharing a lot with a principal use are to be classified for land use purposes differently than the principal use on the parcel, the land use classification of the principal use determines the land use classification of the accessory use.

Based on a parcel analysis, the Petitioner presents convincing evidence that the priests' residence is a use accessory to a principal use, the non-residential, institutional religious facility use, and consequently, an institutional land use. Mr. Vogel rebutted opponent testimony that the priests' residence is a residential land use through evidence based on a parcel analysis, including

¹⁸ Use is defined as: a. Any purpose for which a structure or a tract of land may be designed, arranged, intended, maintained or occupied; or b. Any activity, occupation, business or operation carried on, or intended to be carried on, in a structure, or on a tract of land; except that, wells, septic systems and storm water management systems are not considered uses for purposes of these regulations. c. The term "permitted use" or its equivalent shall not be deemed to include any nonconforming use. Section 103.A.192.

the Parcel 196 SDP-03-064 for St. Louis Church. SDP General Note 36 states the residence will also be used for nonresidential purposes, with the attendant requisite parking. He also introduced into evidence a deed of consolidation and merger for the lot on which the residence was once sited and Parcel 196, conclusive evidence that the priests' residence is sited on Parcel 196.

Although I am sympathetic to opponent testimony about the residential use of the structure, any other conclusion is contrary to more than 80 years of land use law.¹⁹ The late learned land use scholar Norman Williams, Jr. studied more than 200 land use cases to derive five criteria distinguishing an accessory use (which may in fact be a land use distinguishable from the principal use) from a primary use.

1. They must be related to the principal use (usually not explicitly stated in zoning ordinances, but implied).
2. They must be subordinate and clearly incidental to the principal use (usually stated in zoning ordinances).
3. They must be customarily incidental (usually stated in zoning ordinances).
4. They must be located on the same lot as the principal use (Almost always stated in zoning ordinances) and, occasionally, must also be in the same ownership.
5. They must not alter the character of the area or be detrimental thereto (occasionally stated, and almost always implied in zoning ordinances).²⁰

Applying these five criteria to the priests' residence, the Hearing Examiner finds: (1) the priests' residence is related to the principal use of the site, a structure used primarily for religious activities; (2) it is subordinate to and clearly incidental to the religious activity use; (3) it is

¹⁹ Opponent St. Louis Church's take on the priests' residence is also inconsistent with the growing body of Religious Land Use Institutionalized Persons Act ("RLUIPA") and Tax Code case law governing accessory residences on religious facility property. See Shelley Ross Saxer, Faith In Action: Religious Accessory Uses And Land Use Regulation, 2008 UTAH L. REV. 593 (2008). Available at <http://cpubs.utah.edu/index.php/ulr/article/viewDownloadInterstitial/15/6>. Site visited October 28, 2010.

customarily incidental to the principal use; (4) it is located on the same lot as the principal use, and is in the same ownership; (5) it does not alter the character of the area.

The Hearing Examiner therefore concludes the priests' residence is an institutional use activating Section 131.N.22.d(1). This conclusion notwithstanding, the Landscape Manual's landscape perimeter requirements for adjoining institutional uses empowers the Hearing Examiner to require conditional use parking lot and loading area perimeter landscaping to exceed those specified. Landscape Manual, Page 25. The implications of this authority, and its impact on my decision, are discussed in the adverse impact evaluation in Part II.2.

B. Issue #2. Turning Lanes

The next legal issue we address is whether the Hearing Examiner's discretionary authority to impose reasonable conditions on the grant of a conditional use petition encompasses a requirement that the petitioner provides a left turn or bypass lane and an adequately sized deceleration lane on a state highway. This issue arose during the parties' sometimes heated safe access testimony and multiple "bench conferences" between the Hearing Examiner and counsel.

The Petitioner's counsel suggested, by his questions of Messrs. Vogel and Cornelius, that the Hearing Examiner's analysis of the petition under Section 131.B.2.d is limited in what conditions may be imposed to ensure the drives provide safe access with adequate sight distance, implying that anything more than a general review exceeds the examiner's power under the Zoning Ordinance. Opponent St. Louis Church's counsel argued, through his questions, that the language of Section 131.B.2.d includes the broad authority to require the Petitioner to amend the

²⁰ 4 Norman Williams, Jr. et al., American Land Planning Law § 79:8 (rev. ed. 2003).

conditional use plan to depict a precise length for the proposed deceleration lane and to condition approval on the provision of a bypass or left turn lane should SHA require it.

Attendant to these opposing positions, during the early stages of the proceeding the Hearing Examiner took notice of *Halle Companies v. Crofton Civic Ass'n*, 339 Md. 131, 661 A.2d 682 (1994) (holding the Anne Arundel County Board of Appeals may impose a condition upon the grant of a special exception when that condition was not sought during earlier proceedings before the county administrative hearing officer.) There, the Court reaffirmed the Board's power to impose conditions necessary to the protection of the public health, safety and welfare, including in pertinent part, access to the project site via a county road, subject to several conditions detailing the width of entrance travel lanes and the acquisition of the necessary rights-of-way from private property owners.²¹

Because the access in this case concerns an SHA access permit on a state road, the Hearing Examiner subsequently took notice of the Halle decision's reliance on *Exxon, Inc., v. City of Frederick*, 36 Md.App. 703, 375 A.2d 34 (1977) (upholding the City of Frederick Zoning Board of Appeals authority to grant an automobile service station conditional use subject to a

²¹ Condition 2 required Conway Road is to be used as the entrance to the operations, with the following conditions:
a. A right turn lane shall be constructed on eastbound Conway Road at Maryland Route 3 to a minimum length of 500 feet.

b. From the intersection of Patuxent Road and Conway Road to the entrance of the site, the road shall be improved with 12 foot travel lanes and 8 foot shoulders improved to county standards (pursuant to Article 26, Section 3-202(d), Anne Arundel County Code) where the county right-of-way exists. Additionally, the Petitioners shall pursue a diligent course to obtain the right-of-way from private property owners where possible.

c. The Road improvements on Conway Road from Route 3 to Patuxent Road shall be constructed before any rubble landfill or sand and gravel operation begins; road improvements from the intersection of Conway Road and Patuxent Road to the entrance of the site are to be completed within one year of the start of operations.

d. The access obtained to the site from Conway Road shall be through a fee-simple right-of-way, not through an easement.

condition denying egress to US Route 40.)²² Answering in the affirmative Exxon's question on appeal as to whether the Frederick Board could lawfully restrict access to US Route 40, the Court of Special Appeals reasoned the Maryland Code State Transportation Article providing for a permit to be issue by the then State Roads Commission for access to a state highway does not give the Commission (now SHA) "exclusive jurisdiction onto a state highway from abutting commercial or industrial properties." Even where the State grants such access, a municipality, in furtherance of its zoning powers, nonetheless may deny the access as a valid condition to the granting of a special exception or conditional use. Traffic impact is a sufficient basis to deny an application for a special exception. *Exxon, Inc., v. City of Frederick*, 36 Md.App. 703, 706, 375 A.2d 34, 36.

In both these cases, the Boards imposed access conditions subject to their statutory authority to prevent or reduce traffic hazards, congested traffic conditions and to protect the public welfare. This protective power is echoed in Section 130.C of the Zoning Regulations, which instructs the Hearing Authority to deny an application where the authority finds the proposed structure, addition, extension of structure or use, use or change of use, would menace the public health, safety, security, or general welfare, *or would result in dangerous traffic conditions*, or would jeopardize the lives or property of people living in the neighborhood (emphasis added). The dangerous traffic conditions prohibition appears in slightly different language in the adverse impact analysis required by Section 131.B.2.d. This section requires

²² The SHA issues access permits for US 40.

ingress and egress drives to provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

Prior to the instant petition, Howard County hearing examiners had occasion to visit the scope of their authority under Section 131.B.2.d. In Board of Appeals Case No. 03-02C&V, the hearing examiner denied a petition for a proposed religious facility, concluding adverse traffic hazards by the proposed use will be exacerbated because a proposed deceleration lane was not long enough to provide sufficient space to slow down and enter the site and left turn lanes were not provided. In Board of Appeals Case No. 04-07C, the hearing examiner required the petitioner of a proposed religious facility to “provide or cause to be provided” either a left-turn lane or a right side bypass lane on both Ten Oaks Road and Brighton Dam Road at their intersections with the two proposed driveway entrances to the property for a religious facility conditional use. The examiner concluded these improvements were obligatory in light of the need to mitigate the “unusually high volume and high speed of traffic on both roads,” which may cause a hazardous condition as vehicles slow or stop to turn into the property. (Opponents testified in part to the traffic on these roads being very heavy at rush hours and on Sundays.) In another case ultimately resulting in the denial of a proposed religious facility, Board of Appeals Case No. 04-056C, the hearing examiner advised the petitioner that a deceleration lane was desirable given the size, volume and configuration of traffic on Old Annapolis Road. (The traffic volume on Old Annapolis Road was 14,204 AADT in 2001.)

Still, these decisions and orders concerned safe access onto county roads. The Hearing Examiner’s authority to impose safe access conditions on a road where SHA issues access

permits, US 40, arose in Board of Appeals Case No. 02-033C, wherein the Hearing Examiner denied the petition for a religious facility based on part on a proposed access onto US 40 in close proximity to a public street. Also, in Board of Appeals Case No. 06-021C, the hearing examiner required the petitioner to provide a deceleration lane along MD Route 144 (Frederick Road), as an approval condition of a proposed gallery and craft show conditional use.

The Zoning Ordinance clearly allows the Hearing Examiner to impose reasonable access conditions any type of public road as an adjunct to the examiner's charge to guard against dangerous traffic conditions. Accepting the Petitioner's interpretation would so narrowly limit the Hearing Examiner's adverse impact analysis as to render it pro forma.

C. Issue # 3. Parking

We now turn to one of the more contentious issues in this case, parking. May the Hearing Examiner require more parking spaces for a given use than the minimum required by the Zoning Regulations? Section 133.A of the Zoning Regulations mandates all off-street parking and loading facilities to be provided in accordance with the regulations therein for any new structure built or any new use established. Section 133.D establishes minimum parking requirements for broad categories of uses. Relevant to this case is Section 133.D.7.b, which requires 10 parking spaces per public viewing room plus 1.0 space for each employee. Because the chapel is a use accessory to the proposed funeral home, no additional parking is required.

Opponent St. Louis Church presented considerable evidence and testimony that the 66 required spaces provided for the proposed facility are insufficient. Through its counsel's questions and in closing argument, this opponent would like me to require more parking, pointing me to

Section 133.D.8 as authorizing such action. Under this section, DPZ may consider reasonable and appropriate off-street parking requirements different from the list in Section 133.D.

Critically, the parking needs study to be prepared by an applicant under this alternative is to be made at the site development plan stage. The Hearing Examiner's review of prior hearing examiner decisions found no decision and order where the hearing examiner relied on Section 133.D. to require more parking or where the petitioner submitted a parking needs study at the conditional use plan approval. Based on the record, I conclude the Hearing Examiner may not impose more parking on a conditional use than required by the parking regulations.

Moreover, assuming arguendo the Hearing Examiner could require a greater number of parking spaces, the information presented by opponents about the number of visitors at a few viewings or funerals in selected area funeral homes is, in my view, insufficient to serve as a guide. In my view the appropriate means to address the issue of funeral home parking, including accessory use parking, is through the legislative process, which would permit county officials to evaluate the issue objectively.

This limitation notwithstanding, I disagree with the Petitioner's expanded argument on the necessary parking for the use as excluding any consideration of parking needs for those rare circumstances when a large number of persons are in attendance during a visitation or funeral service. I take note here of Mr. Donaldson's claim that the solution in these circumstances at the Petitioner's two other facilities was to turn away potential persons who need more space or different service times to go elsewhere. Given the large size of the proposed facility, the Petitioner undoubtedly intends to use it to accommodate this lost business.

What is also clear from the record is that the Petitioner is proposing an intense use on the site. The concerns expressed by opponents about the need to consider the parking needs of the facility at full capacity are therefore valid. Although Mr. Donaldson testified the Petitioner would limit the number of simultaneous visitations and funeral/chapel services, a condition so limiting the use would be ineffective; it is not self-executing and all but impossible to enforce. Significantly, a conditional use, once granted, becomes a permitted use that runs with the land, not the property owner. The consequence is that a future property owner may simply ignore any limitation on the use.

The Petitioner's reliance on some internal form of management is, effectively, a self-directed effort to manage the intensity of the use. Because I must presume the use will operate to its fullest extent—at full capacity, to use the expression employed by the Hearing Examiner in Board of Appeals Case No. 03-02&V—the general issue of parking adequacy will be furthered examined next in Part II's adverse impact analysis.

III. GENERAL CRITERIA FOR CONDITIONAL USES (SECTION 131.B)

1. **Harmony with the General Plan**. Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

- a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and**

b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

Section 131.B.1.a. The Howard County General Plan designates the area in which the Property is located is a rural residential use area. The site has frontage on and direct access to a collector or arterial highway designated in the General Plan. Funeral homes are presumptively compatible and appropriate in an RR district if the Petitioner adduces evidence that the proposed use is contemplated or addressed in the General Plan through its land use policies or furthers its recommendations, or if the use is positively evaluated under Sections 131.B.1.a and b.

The Petitioner is proposing intense activity at the 25,390-square foot facility to be located on a 3.19±-acre property. However, Opponents failed to demonstrate the proposed use's size and intensity frustrate any land use or policy of the General Plan—and I am unable to find one. Absent such a finding, I must conclude the proposed conditional use is not disharmonious with the 2000 General Plan.

2. **Adverse Effect.** Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria recognizes the potential for adverse impact by virtually every human activity. Conditional use zoning therefore accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed uses

would have adverse effects in an RR district. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects beyond those inherently associated with such a special exception use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

According to the evidence of record, the property is between 3.19 and 3.275 acres in size. The facility has a 16,000-square foot footprint and is 25,390 square feet in overall size. It will contain three viewing rooms and a chapel that can accommodate 152 persons and a large overflow capacity.²³ The deceased will be moved to the funeral home and prepared for visitation, possibly a funeral/chapel service and burial. Persons would call at the funeral home to make arrangements for a deceased person. Two casket rooms are provided to assist in selection. Embalmers will prepare the deceased. Family and other persons will return to the funeral home for a viewing at one of three viewing rooms and/or a funeral service. A catering facility will allow for repast at the facility. The use will also involve funeral processions, or in some instances, the deceased is taken off site for burial or other arrangements. In addition, the facility includes a very large garage.

To accommodate the facility, the Petitioner is requesting two 20-foot reductions in the 50-foot building and parking areas setbacks. Due to the apparent need to locate the septic system on the northeast corner of the Property, the Petitioner also has need of a variance from the health

department to reduce the septic setback from the property line from 10 to 5 feet. As a result, the Petitioner is unable to provide even a Type A landscape along Parcel 196 from the area closest to the road to the end of the parking area. What landscaping is proposed, mostly Leyland Cypress, will be planted on the common lot line.

Further, although Mr. Donaldson agreed to a general limit on visitation hours, he wants the flexibility to accommodate clients who desire different hours. His testimony about funeral/chapel service hours was equivocal. Although testifying that most chapel and funeral processions would take place in the morning, he also acknowledged that a chapel service could take place during visitation hours.

Based on the record, there will be a broad range of activities occurring for an extensive number of hours during the week, on weekends, as well as several evenings. Although the Hearing Examiner intimated during the proceeding of the possibility of imposing some limitation on the hours for chapel services to lessen the intensity of the use, the Petitioner did not respond with specific hours of operation, as was the case with visitation hours.

The Petitioner argues the facility will not be used at its full capacity and that there are no atypical adverse impacts. But the Hearing Examiner must consider the potential impact of the use at its full capacity—at its most intense use—with all three visitation rooms and a funeral service in operation, as well as the general business operations.²⁴

²³ The original petition called for 192 seats and 8 additional disabled seats. The chapel size remains the same.

²⁴ Opponents proffered a map of regional funeral homes as proof of the facility's intense use, but it was objected to and excluded from evidence. When a party seeks to introduce evidence of inordinate adverse effects based on a comparison of other like conditional uses, Maryland case law requires the comparison be between the proposed use with other such uses within the same zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*,

The proposed Type A landscape buffer is already insufficient for the purportedly self-limited use of the facility, there being no or a much-reduced buffer along the area of the proposed septic easement and the common property lot line with Parcel 196. Even what landscaping is proposed cannot be accommodated without plantings on the common property line, Mr. Vogel's rebuttal testimony notwithstanding. Moreover, although I disagree with the TSR's conclusion that Section 131.N.22.d.(2) applies, I do agree with its conclusion that a six-foot privacy fence or masonry wall and a Type E landscape buffer on the north side and a Type D landscape buffer on the south side are needed, given the intensity of use and the necessary presumption that it will operate at full capacity.

The Hearing Examiner has approved conditional use petitions subject to some stiff conditions.²⁵ Here, however, I am reluctant to approve the petition subject to conditions intended to mitigate unique adverse impacts. Such conditions are unachievable on the face of the conditional use plan, and in light of the Hearing Examiner's obligation to evaluate the use

406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995). I take notice here of Board of Appeals Case No. 03-02C&V, wherein the hearing examiner found atypical adverse impacts arising from a proposed religious facility based on an examination of the inordinate number of parking spaces proposed relative to other religious facilities in the R-12 zone. There are no other funeral homes in an RR district, apparently.

²⁵ The Hearing Examiner takes notice of Board of Appeals Case No. 09-011C, which concerned the expansion of a religious facility along another section of MD 108. In that decision and order, I expressly stated my concern that the proposal represented the limit of what can be considered an appropriate use of the site, given what parking conditions could be imposed. The conditions imposed included: a prohibition against using the site's acceleration and deceleration lanes, MD 108 and Cedar Lane Park for parking; requiring the Petitioner to detail a parking management plan note on the Site Development Plan stating a) the steps the Petitioner will undertake to prohibit parking in the site's deceleration and acceleration lanes, along MD 108 and in Cedar Lane Park and to manage Friday afternoon prayer service traffic, b) alternative methods for transporting attendees to Friday afternoon services, such as buses or some other type of transport, and c) how the Petitioner will address infractions of any parking plan violation.

operating at full capacity and the Petitioner's disinterest in limiting chapel service hours.²⁶ The TSR itself recommends site redesign to accommodate a Type E landscape buffer along Parcel 196, but, again, the intense use of the site prohibits its installation within a width that would both ensure the health of the plantings and provide the necessary buffer. Also of considerable concern are the atypical adverse impacts caused by the absence of any lawfully permissible offsite parking anywhere in the area, which the evidence of record instructs us is the Petitioner's solution to accommodating the facility's parking needs when it operates at full capacity.²⁷

My persistent concern in this case has been the dubious ability of the Petitioner to accommodate the proposed intense use on the 3.19-acre site without atypical adverse impacts. Given the record of the case, the Hearing Examiner must conclude the facts in this case clearly establish the adverse effects use at the proposed location are unique and different, to the extent they are sufficient to warrant denial. I find these circumstances will result in the following greater adverse impacts.

a. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

²⁶ Such conditions might have included requiring the Petitioner to provide or cause to be provided turning lanes meeting SHA access permit requirements, a Type E landscape buffer of sufficient width to provide and maintain the necessary plantings and fencing wholly on the Petitioner's property and limiting chapel service hours of operation.

²⁷ A proposed conditional use's need for offsite land for the operation is a de facto unique adverse impact because the need intensifies the use on the subject property. I take notice hear of BA 09-036C, where I denied the Sunday morning tournament use owing to the need of offsite parking for the intense use.

The proposed use is principally an indoor use. The Petitioner's witness Robert Vogel testified to the use of low-level lighting and the petition states lighting will comply with the Zoning Regulations and be directed down and away from adjoining properties. The dumpster will be located in the southwest corner, with no pickups between 9:00 p.m. and 9:00 a.m.

The Petitioner's noise study concludes the average daily traffic along the driveway within the proposed setback (an hourly average of 12 light vehicles per hour and 120 light vehicles maximum, traveling at a maximum speed of 20 MPH) would have a lesser impact on the priests' residence and the prayer garden than the noise already generated from its proximity to MD 108. The study does not consider the episodic noise generated by car doors shutting or other short-lived intermittent sounds to have any adverse impact. Based on this evidence, the Petitioner believes there are no atypical adverse impacts resulting from the location of the driveway within the reduced setback.

I am not so persuaded. The noise study's sound level projections hinge on the difference between vehicle noise in the driveway and the vehicular noise already emanating from MD 108. Yet the adverse impacts test is not comparative; it is made with sole reference to the noise effects of the proposed use. The comparative sound levels between traffic moving along the driveway and what can be heard from MD 108 is of limited import for the purpose of an adverse impact evaluation.

What noise will the facility generate? As Mr. Donaldson testified, during funeral processions up to 65 cars would queue up in the driveway or be parked in the loading area before exiting. Because this evaluation considers the use operating at full capacity—at its most intense

use—we must also consider the noise generated by other persons attending visitations or visiting the facility to arrange for burials, visitations, and funerals. I am not persuaded that the 12 light vehicles per hour or a 120-vehicle maximum per hour presumptions adequately reflect this intensity of use, as these counts apparently considered only the uses within the reduced setback and not the noise impacts of the use operating at full capacity.²⁸ I also observe here the Petitioner's failure to address the impact of the loading area for overflow parking.

In view of this evidence and the entire record in this case, and considering the unacceptable landscape buffer proposed along the common lot line with Parcel 196 (which will not mitigate the noise), as well as the south property line, the Hearing Examiner is not persuaded that the use itself or the use within the reduced setback will not cause atypical adverse noise impacts.

b. Structures and Landscaping. This section calls for the Hearing Examiner to evaluate the record to determine if the Petitioner has demonstrated by a preponderance of evidence that the location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

The Petitioner proposes a facility that requires two 20-foot reductions in the 50-foot setback from the adjoining properties to accommodate the structure's footprint. As this adverse impact analysis makes clear, the proposed buffer along Parcel 196 falls short of even the minimum

²⁸ SHA uses vehicle trips numbers in part when determining the need for, length and width of turning lanes.

landscaping to mitigate the impact of the proposed structure on adjoining uses, much less the desirable Type E landscape buffer, which in my view is necessary to mitigate an intense use on a site that only just meets minimum lot size requirements. The petition does not comport with Section 131.B.2.c.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

Adequacy of size. As was discussed above in Part I.C, Zoning Regulations Section 133 control the number of parking spaces to be provided for a given use. These regulations require 34 space for the facility and 66 are proposed.

The evidence of record also reveals that a major parking issue in this case is the Petitioner's need for offsite "overflow" parking. Mr. Donaldson testified that overflow parking would be handled by queuing up to sixty-five cars in the driveway, but that in the event of any parking problems, visitors would be directed to another site or cars would be lined up in front of the garage, in the loading area. "Another site" included, as least preliminarily, the occasional use of the parking on Christ Lutheran Church's for overflow parking. For this reason, the TSR recommended the elimination of a walkway between the facility and Christ Lutheran Church. Petitioner's witness Robert Vogel maintained it would be a good idea to have an informal parking agreement with the church for the rare overflow. Although the Petitioner may not have direct control over the use of this parking by visitors seeking offsite parking, it is one of only two sites in the area available for overflow parking, the other, of course, being the St. Louis Church site. The Christ Lutheran Church parking lot therefore appears the likely place to put visitor overflow,

which, based on the use operating at full capacity, will occur more frequently than the rare occasion.

Opponent St. Louis staunchly opposes the proposed funeral home in large part because it has concerns about the use of its property for overflow. Monsignor Luka indicated that the church already uses safety cones to block access to the site. The community is very concerned about the additional traffic offsite parking will generate. Moreover, the parking regulations prohibit shared parking among adjoining lots unless the lots are subject to recorded covenants or easements for parking. Zoning Regulations Section 133.B.2. There is no such recorded easement in the record. Additionally, the Christ Evangelical Lutheran Church of Columbia was approved as a conditional use under Board of Appeals Case No. 03-030C (2003) based on a condition that adequate parking be provided onsite, as the TSR points out. It cannot now avail itself of offsite parking, to do so would be cause for the County to revoke the conditional use approval.²⁹

Although the walking path between the funeral home and Christ Evangelical Lutheran Church parking lot has been removed, the evidence of record convinces me the church parking lot will become an offsite parking adjunct to the facility. This is an untenable solution, and one in clear contravention of the Zoning Ordinance. It would also create atypical adverse impact, because the use would involve offsite parking use bleeding into the community as a function of the use's intensity.

²⁹ The use, development or maintenance of a conditional use site in violation of the conditional use plan, or of any conditions imposed by the approving Hearing Authority is a violation of the Zoning Regulations and grounds for revocation of the conditional use. Zoning Regulations Section 130.H.3.

Parking Location and Screening. Zoning Regulations Section 103.137 defines a "parking area, parking facility or parking use" as "[a]ny area of a lot or structure used for off-street parking and circulation of motor vehicles, including the area occupied by parking spaces, driveways, and vehicle stacking lanes (e.g. for a car wash or drive-through window)." For the most part, about 28 spaces will be located directly behind the chapel. Another 13 spaces are depicted on the conditional use plan perpendicular to the common lot line with the Christ Evangelical Lutheran Church and behind the chapel. Thirteen additional spaces abut the north side of the funeral home portion of the facility. There are also three disabled spaces perpendicular to the front of the facility. In addition, the Petitioner is proposing an internal driveway that provides access to the parking in front of the facility and also runs parallel to the facility to provide access to the parking area to the rear. The longer driveway will be located entirely with the 50-foot setback and 30 feet from the common property line with Parcel 196.

The parking in front of the facility will be buffered from MD 108 by a Type E landscape buffer. Because the adjoining uses are institutional, not residential uses, the residential buffering requirements, with respect to the parking, is inapplicable.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

This standard requires the Hearing Examiner to evaluate the Petitioner's evidence that visitors and employees will be able to access the facility site safely. It must also be read with Zoning Regulations Section 130.C grafted onto this evaluation. This provision instructs the Hearing Examiner to deny an application where I find the proposed structure, addition, extension

of structure or use, use or change of use, would menace the public health, safety, security, or general welfare, or would result in dangerous traffic conditions, or would jeopardize the lives or property of people living in the neighborhood.³⁰

A. Sight Distance. Petitioner's traffic expert Mickey Cornelius testified the site requires a 606-foot sight distance in both directions to meet SHA sight distance criteria. He also opined that sight distance at the unsignalized access point would not be a problem for funeral processions because traffic would be stopped. The Hearing Examiner concludes sight distance appears to be adequate.

B. Turning Lanes. Petitioner's civil engineer/land use expert Robert Vogel testified to the acceptability of the acceleration and deceleration lanes. Traffic expert Mickey Cornelius opined the 54-foot long deceleration lane depicted on the amended conditional use plan was adequate and that Parcel 196 to the north has usable public ROW to meet SHA's 250-foot partial deceleration lane length requirement, if necessary. Opponents of this petition argue, through counsel's questioning, that the conditional use plan should depict the correct SHA deceleration lane length and width. I agree. The General Plan depicts MD 108 in this area as a Major Collector. An adequately sized deceleration lane for the intense use is a mandate, based on the predicate of the facility operating at full capacity.

As Petitioner's traffic engineer expert Mickey Cornelius testified, SHA would require a left turn (northbound) or bypass lane and the original conditional use plan shows there is enough ROW available on the east side to MD 108 to meet SHA access requirements. In his rebuttal

³⁰ Section 130.C codifies the protective power of the Hearing Examiner to impose conditions on a conditional use

testimony, he averred it is unclear whether either lane is needed owing to the low volume of left turning vehicles (less than five percent).

Opponents' considerable opposition to the absence of a left-turn or bypass lane on the either the original or amended conditional use plan first took the form of video evidence. The two evening rush hour videos (Opponents' Exhibit 8) depict traffic stopped on northbound MD 108 in front of the facility and up to Ten Oaks Lane. These videos breathe life into the AADT figures above, and give us a real sense of the nature of the traffic conditions along MD 108. Opponent St. Louis Church witness Patrick Marlatt also offered evidence refuting the Petitioner's evidence about the availability of sufficient ROW for a bypass/turn lane.³¹ Opponents' Exhibit 12, SHA Plat # 52696 is intended to dispute the Petitioner's evidence about the availability of sufficient ROW to construct the SHA-required bypass or left turn lane and a 16-foot wide deceleration lane, the width required by SHA. According to the information on the plat, the ROW is several feet short of the 26-foot ROW depicted on the plan.

The Petitioner rebutted this evidence through SHA Plat #59062 (Petitioner's Exhibit 9). Introduced by Mr. Vogel, the engineer admitted his uncertainty about whether the available ROW was 20 or 26 feet. Given this uncertainty, he spoke to SHA and now feels the Petitioner could still

plan to protect the public health, safety and welfare.

³¹ Overruling objections to the alleged lack of expertise on Mr. Marlatt's part to testify as to the content of the plat, the Hearing Examiner noted first that the Hearing Authority does not qualify expert witnesses because the proceeding is an administrative hearing. Moreover, despite Mr. Marlatt's expert background in fire protection, as a Corporator of St. Louis Church he was offering non-expert testimony about a public document that on its face allegedly contradicts the Petitioner's witness ROW testimony. The mere fact that objectors are lay witnesses does not make their testimony less valuable than the "expert" evidence. The test is one of credibility. The Hearing Examiner takes notice of Board of Appeals Case No. 07-011C, where I denied a proposed age-restricted, adult housing conditional use based in pertinent part on a neighbor's testimony about unsafe access to the site when it snowed.

provide a centerline adjustment for a bypass lane or turn lane, if warranted, by using a few frontage feet.

The Hearing Examiner is greatly concerned about the Petitioner's evidence, which is ambiguous and even silent on the conditional use plan with respect to the turning lanes to be provided to support the use. MD 108, a Major Collector, in front of the site is a two-lane road whose design is not intended to hand the current level of traffic. In 2008, the traffic volume on MD 108 south of Ten Oaks Road was 16,783 AADT. According to the Howard County Design Manual, Volume III, Road and Bridges, Appendix A, one of the characteristics of a Major Collector is a 1,500-6,000 AADT (average daily trips). I am therefore not persuaded the deceleration lane depicted on the amended conditional use plan is long and wide enough to provide space for vehicles to slow down and enter the site from northbound MD 108 without exacerbating the already adverse traffic hazards in the area. Certainly, the conditional use plan could have depicted various turning lane alternatives to demonstrate safe access and meet SHA standards, as the adjoining Christ Evangelical Lutheran Church of Columbia did in Board of Appeals Case No. 03-30C.³² My concern about safe access also stems from Petitioner testimony about operators and employees managing funeral processions by instructing motorists to stack their vehicles along the driveway.

In accord with Zoning Regulations Section 130.G, the applicant for a conditional use has the burden of proof, by a preponderance of persuasion, on all questions of fact that are to be

³² The Hearing Examiner in that case found no atypical adverse impacts arising in the safe access evaluation because the conditional use plan or some other evidence presented three alternative access drives for SHA's ultimate approval.

determined by the Hearing Authority or are required to meet any provisions of the Zoning Regulations. At bottom, the Petitioner's evidence on this matter is inconsistent and the Hearing Examiner concludes that, considered in its totality, it might well be deemed not credible, in significant part, by the Hearing Examiner. In light of all the evidence, I am not persuaded there is safe access to the site.

**III. SPECIFIC CRITERIA FOR FUNERAL HOMES AND MORTUARIES
(SECTION 131.N.22)**

A conditional use may be granted in the RC, RR, R-ED or R-20 Districts for funeral homes or mortuaries provided that:

a. The area of the lot shall be not less than three acres.

According to Robert Vogel's testimony, the Property is 3.19 acres in size. According to the petition, the Property is 3.275 acres in size. The petition comports with Section 131.N.22.a.

b. The site has frontage on and direct access to a collector or arterial highway designated in the General Plan.

The site fronts on and has direct access to MD 108, which is depicted as a Major Collector on the 2000 General Plan Transportation Map.

c. The design of new structures or additions to existing structures will be compatible in scale and character with residential development in the vicinity, as demonstrated by architectural elevations or renderings submitted with the petition.

The purpose of this standard is to allow a limited, compatible nonresidential use in the RR zone. The parties have two disagreements as to the proposed facility's compatibility, what "compatible" means, and the geography of compatibility. Petitioner's witnesses focused on the

facility's relationship to the surrounding residences in terms of its siting, scale, bulk, height, material, and textures. They testified to the smaller width of the facility relative to the priests' residence, avowing it would overwhelm this structure. Mr. Vogel testified that the smaller size of the Christ Lutheran Church parsonage and all the residential structures along this part of MD 108 did not mean the facility was incompatible. Architect John Mr. Gary testified the facility would be compatible with the adjacent rectory because it is similar in height and scale, because fenestration and other features break up the facility's bulk and because the construction is designed to "step down" with the inclined slope to further reduce its visual impact. The 160-165 foot distance between the facility and the rectory also contributes to compatibility.

Opponent St. Louis Church witnesses contest this definition. Architect Al Ruebling presented a studied analysis of the difference in volumetric character between the proposed facility and the priests' residence using multiple computer-generated bird's eye perspective images grafted onto Google maps. Landscape architect Miguel Iraola's testimony and evidence focused on the difference in lot and dwelling size, the width of the facades facing MD 108 or Guilford Road, and stylistic differences.

The Hearing Examiner credits Mr. Vogel's definition and Mr. Gary's testimony. It comports with the plain meaning of "compatibility," which does not connote sameness or consistency, but "capable of existing or performing in harmonious, agreeable, or congenial combination with another or others." The American Heritage Dictionary of the English Language, 4th Edition (2000). Accepting Mr. Iraola's definition would impose impermissible uniformity on the compatibility test. Mr. Ruebling's volumetric character gloss on the compatibility test so

diverges from its purpose as to be irrelevant. Compatibility of scale in this context is a tangible measurement made at street level. The bird's eye views offered he offered in evidence are discordant to our appreciation of the elements of the facility relative to vicinal residential structures.

Although the Petitioner's witnesses did not define a geography of compatibility, the focus, through counsel's questioning, was on the "viewshed," what a person could see looking at the property from an immediate vantage point (i.e., from across the property). The Opposition's compatibility geography was defined as a quarter mile radius of the Property, which the Hearing Examiner rejected as arbitrary.³³

The analysis of compatibility of scale and character is a visual one, and one made within the geography of the surrounding streetscape, an area somewhat broader than a viewshed. The testimony and exhibits of record presents us with two views of the vicinal streetscape, which read together, present provide sufficient evidence that the Petitioner satisfies the compatibility standards required by this section.

As a first matter, I take notice of my observations during my two site visits. The rise in elevation on Parcels 162 and 88 visually conceal the residence on Parcel 162 and the residences on the north side of Guilford Road, including several residential structures included in Opponent Exhibit 2 and intended to disprove compatibility. This topography is depicted on the amended conditional use plan. Then there are the videos comprising Opponents' Exhibit 8. The view is

³³ The ¼-mile study area excludes the newer and much larger residences to the south and along MD 108 and the north side of Guilford Road.

from a vantage point across from the subject property. The pans up and down MD 108 do not gather in any residential structure.

Based on my site visit and Petitioner's Exhibit 5A-P, 16 photographs, viewed in context of the testimony by Messrs. Vogel and Gary, the Hearing Examiner finds the character and scale of the proposed facility well related to vicinal properties and appropriate. The building elevations are divided into distinct plans and architectural details are intended to achieve compatible scale and massing.

d. Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially-zoned properties other than public road right-of-ways. The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater, if:

- (1) The adjoining land is committed to a long term institutional or open space use that provides an equivalent or better buffer for vicinal residential development or;**
- (2) The petition includes detailed plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent combination, that presents an attractive and effective buffer for neighboring properties.**

The functional goal of these two buffering and screening provisions is to provide some balance between adjoining land uses. The Petitioner believes the variant of a Type A landscape buffer proposed and a 6-foot high privacy fence on the northern portion of the Property will impart the needed balance. Still, a large section of the landscaping buffer in the area of the proposed septic system will be planted on the property line.

For the reasons discussed above, the Hearing Examiner agrees with the TSR that a Type E landscape buffer of sufficient width to accommodate necessary plantings and fencing is warranted

on the north property line and a Type D buffer on the south lot line to adequately buffer and screen the parking lots and loading areas of the intense use. (These loading areas, as Mr. Donaldson, would be used for overflow parking when needed.)

Because the evidence of record convinces the Hearing Examiner that the Petitioner is unable to provide the type of perimeter landscaping, screening and buffering warranted by the use at the necessary width, the requested reduced setbacks are denied.

e. At least 20 percent of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

About 31 percent (16,454 square feet of the 53,092 square foot building envelope) would be green space, in accordance with Section 122.D.e.

f. Crematoriums are permitted as accessory uses to a funeral home or mortuary.

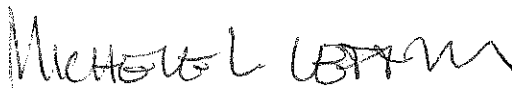
Because no crematorium is proposed, this section is inapplicable.

ORDER

Based upon the foregoing, it is this 29th day of November 2010, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the petition of is **DENIED.**

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

A handwritten signature in dark ink, appearing to read "Michele L. LeFaivre", written over a horizontal line.

Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing. G15